

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JORGE VAZQUEZ,

Petitioner

V.

JO GENTRY, et al.,

Respondents

Case No.: 2:18-cv-00117-JAD-VCF

Order Dismissing Petition

[ECF Nos. 7, 11]

Pro se petitioner Jorge Vazquez brings this petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his Nevada state-court conviction and sentence for burglary and solicitation to commit murder.¹ Respondents move to dismiss Vazquez’s petition as untimely. Even if I assume that generous equitable tolling applies, Vazquez’s petition was years late. So I grant the motion, dismiss this petition, and close this case.

Background

A jury convicted Vazquez of solicitation to commit murder, attempted murder, and three counts of burglary in connection with his attempt to hire an undercover police officer to kill his wife.² After motion practice and oral argument about whether the court should adjudicate on both solicitation to commit murder and attempted murder, the court declined to adjudicate the solicitation count.³ The court sentenced Vazquez to three concurrent terms of 28 to 72 months

¹ ECF No. 1-1 at 2 (exhibit 24).

² Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 7, and are found at ECF Nos. 8–10, 12.

³ Exhs. 25–27.

1 on the burglary counts,⁴ to 96- to 240 months for attempted murder,⁵ consecutive to counts 1-3,
2 and to 12 months on child neglect or endangerment,⁶ concurrent to count 5.⁷ Judgment of
3 conviction was entered on November 19, 2012.⁸

4 On December 3, 2013, the Nevada Supreme Court affirmed the conviction for one count
5 of burglary but reversed the burglary convictions on counts 2 and 3, the attempted-murder
6 conviction, and the child-neglect-or-endangerment conviction for insufficient evidence.⁹ The
7 Nevada Supreme Court also directed that Vazquez should be adjudicated and sentenced on the
8 solicitation count.¹⁰

9 On January 27, 2014, the state district court sentenced Vazquez to 72 to 180 months for
10 the solicitation conviction, to run consecutive to the previously-imposed sentence of 28 to 72
11 months for the first burglary count.¹¹ The amended judgment of conviction was entered on
12 February 19, 2014.¹²

13 On April 7, 2014, Vazquez filed a motion to modify and/or correct illegal sentence,
14 which the state district court denied.¹³ The Nevada Supreme Court affirmed the denial of the
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17 ⁴ Counts 1–3.

18 ⁵ Count 5.

19 ⁶ Count 6.

20 ⁷ Exh. 29.

21 ⁸ Exh. 30.

22 ⁹ Exh. 51.

23 ¹⁰ *Id.*

¹¹ Exh. 54.

¹² Exh. 55.

¹³ Exhs. 56, 57, 60.

1 motion on September 18, 2014, holding that Vazquez’s claims fell outside the narrow scope of
2 claims permissible in a motion to modify sentence.¹⁴ Remittitur issued on October 17, 2014.¹⁵

3 Vazquez filed a federal habeas corpus petition in November 2014, which was dismissed
4 on February 3, 2016, without prejudice as wholly unexhausted.¹⁶ He filed a state postconviction
5 habeas corpus petition May 10, 2016.¹⁷ On October 12, 2017, the Nevada Court of Appeals
6 affirmed the denial of the petition as procedurally barred because it was untimely and successive
7 or an abuse of the writ.¹⁸ Remittitur issued November 8, 2017.¹⁹

8 Analysis

9 A. AEDPA and equitable tolling

10 The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April
11 24, 1996, and imposes a one-year statute of limitations on the filing of federal habeas corpus
12 petitions.²⁰ The one-year filing period can run from the date on which a petitioner’s judgment
13 became final by conclusion of direct review or the expiration of the time for seeking direct
14 review.²¹ A properly filed petition for state postconviction relief can toll the period of
15 limitations.²²

18 ¹⁴ Exh. 65.

19 ¹⁵ Exh. 66.

20 ¹⁶ 2:14-cv-1969-JAD-PAL.

21 ¹⁷ Exh. 67.

22 ¹⁸ Exh. 83.

23 ¹⁹ Exh. 85.

²⁰ 28 U.S.C. § 2244(d).

²¹ 28 U.S.C. § 2244(d)(1)(A).

²² 28 U.S.C. § 2244(d)(2).

1 A petitioner may be entitled to equitable tolling of the filing deadline if he can show ““(1)
2 that he has been pursuing his right diligently, and that (2) some extraordinary circumstance stood
3 in his way’ and prevented timely filing.”²³ Equitable tolling is “unavailable in most cases,”²⁴ and
4 “the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the
5 rule.”²⁵ The petitioner ultimately has the burden of proof on this “extraordinary exclusion.”²⁶
6 To satisfy it, he must demonstrate a causal relationship between the extraordinary circumstance
7 and the delay in his filing.²⁷ Ignorance of the one-year statute of limitations does not qualify as
8 an extraordinary circumstance.²⁸

9 **B. Vazquez’s Federal Petition is Time-barred.**

10 The state district court filed Vazquez’s amended judgment of conviction on February 19,
11 2014.²⁹ Under Nevada Rule of Appellate Procedure 4(b), Vazquez had 30 days to file a timely
12 notice of appeal. He did not appeal, so his conviction became final on March 21, 2014.³⁰ Under
13 AEDPA, Vazquez had one year, or until March 21, 2015, to file his federal habeas petition
14 unless otherwise tolled by federal statute.³¹

17 ²³ *Holland v. Florida*, 560 U.S. 631, 649 (2009)(quoting prior authority).

18 ²⁴ *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

19 ²⁵ *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*,
212 F.3d 1005, 1010 (7th Cir. 2000)).

20 ²⁶ *Miranda*, 292 F.3d at 1065.

21 ²⁷ E.g., *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

22 ²⁸ See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s lack of
legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling”).

23 ²⁹ Exh. 55.

³⁰ *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012).

³¹ 28 U.S.C. § 2244(d)(1)(A), (2).

1 On April 7, 2014, 17 days after his conviction became final, Vazquez filed a motion to
2 modify sentence in state district court.³² The Nevada Supreme Court affirmed the denial of the
3 motion on September 18, 2014, holding that Vazquez’s claims fell outside the narrow scope of
4 claims permissible in a motion to modify sentence.³³ Remittitur issued on October 17, 2014.³⁴
5 Assuming without deciding that this motion could be considered “properly filed” in order to toll
6 the AEDPA limitation period, 193 days would be tolled.

7 Next, Vazquez filed his first federal habeas petition in November 2014, which was
8 dismissed on February 3, 2016, without prejudice as wholly unexhausted.³⁵ Because a federal
9 habeas petition is not an “application for State post-conviction or other collateral review” under
10 § 2244(d)(2), Vazquez’s first federal petition did not toll the AEDPA limitation period.³⁶ So,
11 even if 210 days were tolled (17 + 193), Vazquez’s federal limitations period expired about
12 March 23, 2015. Vazquez did not file his state postconviction habeas petition until nearly
13 fourteen months later May 10, 2016.³⁷ On October 12, 2017, the Nevada Court of Appeals
14 affirmed the denial of the petition as procedurally barred because it was untimely and successive
15 and/or an abuse of the writ.³⁸ Remittitur issued November 8, 2017.³⁹

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19 ³² Exh. 56, 57, 60.

20 ³³ Exh. 65.

21 ³⁴ Exh. 66.

22 ³⁵ 2:14-cv-1969-JAD-PAL.

23 ³⁶ *Duncan v. Walker*, 533 U.S. 167, 181–182 (2001).

³⁷ Exh. 67.

³⁸ Exh. 83.

³⁹ Exh. 85.

1 Vazquez filed the current federal petition on or about January 18, 2018.⁴⁰ Thus, the
2 petition was filed nearly three years after the AEDPA limitations period expired. The petition is,
3 therefore, time-barred. Vazquez does not argue that he is entitled to any equitable tolling.⁴¹ He
4 has not demonstrated that he acted diligently or that an extraordinary circumstance stood in his
5 way and prevented timely filing of his current federal action.⁴² Because Vazquez has failed to
6 demonstrate that his petition should not be dismissed as untimely, I grant the respondents'
7 motion and dismiss this petition with prejudice as time-barred.

8 **Certificate of Appealability**

9 Because this is a final order adverse to the petitioner, Rule 11 of the Rules Governing
10 Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA).
11 Under 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has made a
12 substantial showing of the denial of a constitutional right.” For claims rejected on their merits, a
13 petitioner “must demonstrate that reasonable jurists would find the district court’s assessment of
14 the constitutional claims debatable or wrong.”⁴³ For procedural rulings, a COA will issue only if
15 reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a
16 constitutional right and (2) whether the court’s procedural ruling was correct.⁴⁴ In light of the
17 clear tardiness of this petition, I find no basis to issue a certificate of appealability, so I sua
18 sponte decline to issue one.

20 ⁴⁰ ECF No. 5.

21 ⁴¹ See ECF No. 15.

22 ⁴² *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006).

23 ⁴³ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

⁴⁴ *Id.*

1 **Conclusion**

2 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss the petition (ECF
3 No. 7) is **GRANTED**, and this petition is **DISMISSED** with prejudice.

4 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

5 **IT IS FURTHER ORDERED** that respondents' motion for leave to file exhibit under
6 seal (ECF No. 11) is **GRANTED**.

7 The Clerk of Court is directed to ENTER JUDGMENT accordingly and CLOSE THIS
8 CASE.

9 Dated: February 28, 2019

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11 U.S. District Judge Jennifer A. Dorsey
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